

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-6107

United States Court of Appeals

FOR THE SECOND CIRCUIT DEC 29 1977

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

BERTRAM L. PODELL,

Defendant-Appellant.

APPELLANT'S REPLY BRIEF

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FOR THE SECOND CIRCUIT

Docket No. 77-6107

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

BERTRAM L. PODELL,

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APPELLANT'S REPLY BRIEF

POINT I

The Material Deleted From Count One of the Indictment Negates Any Intent to Admit the Amount of Fees Paid.

[Replying to Appellee's Point I]

The decision of the Court below and the Appellee's argument is predicated entirely upon findings that (a) as a matter of law, BERTRAM L. PODELL (PODELL) admitted each and every allegation in Counts 1 and 5 of the Indictment, as pleaded to; and (b) that the Government's proof before the Court below established the identity of the "fees" referred to therein (285A Appellee's Br. pp. 14-15).

Neither proposition is sustained by law or proof. The plea established only the existence of a conspiracy and PODELL's participation in it. Nothing more was in issue.

Those portions of the Indictment which identified the "overt acts" and "fees" relevant here were carefully deleted at the time of the plea.

The overt acts so carefully deleted from in Count 1 of the Indictment contained (among others) the following allegations:

* * *

"5. On or about December, 1968 the defendants BERTRAM L. PODELL and HERBERT S. PODELL, caused a bill for \$10,000 to be mailed from New York, New York to the offices of LCI, in Queens County, New York.

6. On or about January 7, 1969 the defendants BERTRAM L. PODELL and HERBERT S. PODELL, received in New York, New York a check for \$10,000 from LCI.

7. On or about March 1, 1969 the defendants BERTRAM L. PODELL and HERBERT S. PODELL caused a bill for \$2,350 to be mailed from New York, New York to the offices of LCI in Queens County, New York.

* * *

8. On or about March 17, 1969 the defendants BERTRAM L. PODELL and HERBERT S. PODELL received a check in New York, New York for \$2,350.

* * *

12. On or about May 1, 1969 the defendant MARTIN MILLER delivered to the defendant BERTRAM L. PODELL a check for \$29,000." (42A-43A).

If, as the Court below found and Appellee argues, PODELL's plea admitted that these payments constituted the "fees" referred to in the Indictment, why were these allegations deleted from the "carefully delineated and specific" portions of the Indictment pleaded to?

The conclusion is inescapable that, in fact, the bargain between PODELL and the Government did not encompass or even contemplate any admission beyond that contained in the allocution, much less an agreement as to the receipt of

any specific amount of money. It was not a necessary element of the crime, it was not sought and it was not given.

The bargain contemplated that which the Government received in open Court, to wit: an admission by PODELL that he was "indirectly compensated through (his) law firm for * * * appearances before the CAB and FAA while a member of congress". (62A).

No proof was submitted to the Court below identifying this compensation.

POINT II

Assuming Appellee's Right to an Accounting of Payments Made in Violation of §203A, Awarding Judgment, Prior to Rendition and Settlement of the Account Was Inappropriate.

[Replying to Appellee's Point II]

The complaint herein sought "an accounting from defendant, BERTRAM L. PODELL, for the monies, profits, gratuities, or emoluments obtained or derived from the conduct and transactions complained of * * *". (8A).

Assuming, for the sake of argument, that the Government, is entitled to *any* recovery of fees paid in violation of the Conflict of Interest Statute. It is axiomatic that such a right could only extend to monies or profits actually paid to or for the benefit of the defendant. Such a remedy could not (and surely should not) be employed to impose a fine or penalty.

Accordingly, the Government initially pursued the proper course, under its theory, in seeking an accounting.

If the Court below had granted the Government the relief which it sought, to wit: an accounting, the conflict

between the Government and other claims to the same fund (particularly that of the payor, LEASING CONSULTANTS, INC. or its trustee) would have been resolved. The Court below, however, did more than direct an accounting, it determined the account before its rendition, and upon becoming aware of the problem its action created said, in effect, too bad.

The present position of the Appellee is even more bewildering, it insists upon its right to recover in addition to the \$29,000 payment, the payments of \$10,000 and \$1,000 it knows have been ordered returned to LEASING CONSULTANTS, INC. by the Bankruptcy Court of the Eastern District of New York (Appellee's Br. p. 18).

Both the Court below and Appellee seem to find it surprising that it did not occur to either PODELL or his Counsel that if the return of the \$11,000 to LCI was upheld, the Government would seek, under any circumstances, to exact a duplicate payment, however it might arise or take an unfair and unseemly advantage even if presented with the opportunity, gratuitously.

Respectfully submitted,

DANIEL M. SHIENTAG
Attorney for Defendant-Appellant



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JAMES E. HILL JR.
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

*Rec'd
for McCarr*

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SOUTHERN DISTRICT OF NEW YORK